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Application Number

09/747,529

Filing Date

12/22/2000

First Named Inventor

Sheppard, Jr.

Art Unit

1771

Examiner Name

Befumo, Jenna Leigh

Attorney Docket Number

2827

ENCLOSURES

(Check all that apply)

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Firm Name	Dougherty & Clements		
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THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant)	James M. Sheppard JR.
Application No.)	09/747,529
Filed)	12/22/2000
Title)	JACQUARD WOVEN TEXTILE WITH GRAPHIC IMPRESSION AND A METHOD OF MAKING THE SAME
Examiner)	Befumo, Jenna Leigh
Art Unit)	1771

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

RESPONSE TO NON-COMPLIANT APPEAL BRIEF

Please find attached hereto an amended Appeal Brief.

"The determination of how "concise" the explanation must be will need to be determined on a case-by-case basis. If the prosecution and examination has been based upon a discussion of the patentability of individual claims instead of the "invention," it is expected the explanation will be more "concise" than if the prosecution and examination has been conducted on the basis of the "invention." As to what is required, the proposed rule states that reference to the specification by page and line number, and to the drawing, if any, by reference characters is required. *Appellant may include any other information of record which will aid the Board in considering the subject matter of each independent claim.*" 49976 Federal Register / Vol. 69, No. 155 / Thursday, August 12, 2004 / Rules and Regulations, Comment 53.

A "concise explanation" therefore defines a minimum. As clearly stated in the comments to the rules, the Applicant is free to include additional information of record that he believes helpful to the board in considering the subject matter. The Applicant believes the summary of the claimed subject matter in the Appeal as filed meets the minimum standard set forth. Information that was also provided by the Applicant to "*aid the Board in considering the subject matter of each independent claim*" is allowed under the rules.

The Applicant therefore declines to amend the summary of the claimed subject matter at this time.

In effort to expedite the resolution of the matter, the Applicant has amended and cross noted the claim chart of the originally filed Appeal Brief to specifically point to that portion of the specification where each limitation of the independent claims is discussed. The grounds of rejection have also been amended in accordance with the Examiner's suggestion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brandon G. Williams", with a stylized, flowing script.

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Attorney's Docket 2827



IN THE UNITED STATES
PATENT AND TRADEMARK OFFICE BEFORE THE
BOARD OF
PATENT APPEALS AND INTERFERENCES

In re Application of:

Sheppard Jr.

Serial No.: 09/747,529

Filed: December 22, 2000

For: JACQUARD WOVEN
TEXTILE WITH GRAPHIC
IMPRESSION AND A
METHOD OF MAKING THE
SAME

Group Art Unit: 1771

Examiner: Befumo, Jenna-Leigh

Appeal No.:

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

BRIEF OF APPELLANTS

This is an appeal from the final rejection of the Examiner dated February 24, 2006, rejecting Claims 21, 22, 24-30, and 32-36, all claims currently pending in the case. The Appellant files this Appeal under 37 C.F.R. § 41.31(a), having had all claims twice rejected. The requisite fee set forth in 37 C.F.R. § 41.20(b) was presented on December 23, 2004.

REAL PARTY IN INTEREST (37 C.F.R. § 41.37(c)(1)(i))

Inventor James M. Sheppard has assigned all his rights and interests in the current invention to Devant Ltd., a North Carolina Corporation. As such, Devant Ltd. is the real party in interest in this case. Mr. Sheppard is the President of Devant Ltd.

RELATED APPEALS AND INTERFERENCES (37 C.F.R. § 41.37(c)(1)(ii))

This case has been before the board once before in Appeal No. 2004-1029. In a decision dated July 29, 2004, the Board reversed the Examiner's previous rejection of record. A copy of the Board's decision is included in the Related Proceedings Appendix. Prosecution was reopened. This appeal follows.

An appeal has been filed for related Application Serial No. 09/837,094, entitled JACQUARD OR DOBBY WOVEN TEXTILE WITH GRAPHIC IMPRESSION AND A METHOD OF MAKING THE SAME, having a filing date of April 18, 2001. A Notice of Appeal was filed on March 16, 2006. Appellant's Appeal brief in that case was filed on the same date as this Brief. The claims in this related case are similar to those under appeal herein and are rejected under 35 U.S.C. 103(a) as obvious over the same references used by the Examiner here.

An appeal has been filed for related Application Serial No. 10/314,794, entitled A METHOD OF MAKING JACQUARD WOVEN TEXTILE WITH GRAPHIC IMPRESSION, having a filing date of February 19, 2003. A Notice of Appeal was filed on April 1, 2006. Appellant's Appeal brief in that case was filed on the same date as this Brief.

The Board is asked to consider all three appeals as a group as the subject matter and the rejections of each are related.

STATUS OF CLAIMS (37 C.F.R. § 41.37(c)(1)(iii))

The application was filed on December 22, 2000, claiming priority under 37 C.F.R. § 1.78(a)(4) of U.S. Provisional Application No. 60/173,275 filed on December 28, 1999. The application was originally filed with 20 claims of which two (2) were independent claims (Claims 1, and 16).

All of the claims were rejected in the Examiner's first Office Action of October 4, 2002.

An Examiner interview was conducted on November 6, 2002, where the Examiner suggested changing the claims to product-by-process claims to more clearly define the structure of the finished product.

In Appellant's response dated November 18, 2002, all of the original claims 1-20 were canceled, and new claims 21-36 were added in light of the Examiner's comments during the interview. Claims 21 and 29 were the only two independent claims that were added.

In the subsequent Office Action of January 23, 2003, which was made final, the Examiner rejected all claims 21-36.

On April 23, 2003, the Appellant filed a Notice of Appeal to the Board of Patent Appeals and Interferences, followed by an Appeal brief. In a decision dated July 29, 2004, the Board reversed the Examiner's rejection and affirmed the Appellant's position regarding the Examiner's rejection.

The Examiner then reopened prosecution, issuing a new Office Action on October 4, 2004, rejecting all Claims 21-36. Having had the claims twice rejected, Appellant filed an Appeal Brief on December 23, 2004.

The Examiner again reopened prosecution, and issued an Office Action on July 14, 2005, again rejecting all Claims 21-36 on different art.

The Appellant filed a response to the Office Action on September 20, 2005. Independent Claims 21 and 29 were amended to include limitations of dependent claims 23 and 31 respectively. Claims 23 and 31 were canceled.

In the subsequent Office Action of February 24, 2006, which was made final, the Examiner rejected all Claims 21, 22, 24-30, and 32-36.

The status of the claims is as set out in Examiner's Final Rejection dated February 24, 2006, and is as follows:

Allowed claims — none

Claims objected to — none

Claims rejected — 21, 22, 24-30, and 32-36.

STATUS OF AMENDMENTS (37 C.F.R. § 41.37(c)(1)(iv))

The Examiner issued a final Office Action on February 24, 2006. The claims being more than twice rejected, Appellant has chosen to directly appeal the Office Action under 37 C.F.R. § 41.31(a).

SUMMARY OF CLAIMED SUBJECT MATTER (37 C.F.R. § 41.37(c)(1)(v))

Table 1 provided in the attached index, maps each claimed feature of independent claims 21 and 29 to their relevant disclosure in the Application.

In the weaving of terry toweling, three series of yarns are employed: (a) pile warp which produces the loops for the pile surface (b) ground warp from which the pile warp projects and (c) weft which binds the two warps together.

Jacquard weaving is a well-known process that can be employed for creating thick, luxurious pile textile items capable of having a velour or looped terry nap. This weaving process can employ two different colors in the linear band of the warp filaments when fabricating the textile.¹ Colors and patterns in a jacquard article are restricted to the two colors employed in a given linear direction of the woven article. Pile warp that is not utilized on the front pattern surface can be woven into terry loops on the reverse side of the textile, woven into the ground warp and weft fibers to create a non-looped, flat weave on the reverse side, or allowed to “float” as unwoven fibers along the backside. This limits the utility for these types of articles, since many designs and logos cannot be adequately reproduced within the confines of the jacquard two-color scheme.

Printing processes on jacquard fabrics have been limited to preprinting the warp filaments with an elongated vertical pattern such that when woven, a jacquard article with more than 2 colors can be achieved. This process requires elaborate computer controlled printing onto the filaments, and very precise monitoring of the weaving process. Printing a pattern post-weave on an article has been employed in non-jacquard situations, but this results in an article that is largely limited to a single color on the nonprinted side of the article. Printing on the reverse side of the non-jacquard article is largely prohibited due to the likelihood that the separately printed images on opposite sides of the article will bleed through the article and disfigure the images on both printed sides. Post printing also has the undesirable side effect of decreasing the absorbency of the towel.

¹ U.S. Pat. App. No. 09/747,529 as filed, page 2, paragraph 3.

Appellant has recognized the deficiencies of both the jacquard weaving process, namely the limitation of a two-color scheme in a linear band, and the traditional printing process (wherein the finished article is limited to a single color in the unprinted area) and has created the novel “Edge® Towel,” an embodiment of claim 21. Claim 21 uses jacquard weaving to form a towel having a central light colored area, surrounded by a dark border. The reverse side of the towel is a dark colored central area surrounded by a light colored border. A design can be positioned in the light colored central area of the first side. The dark colored border surrounding the light central area is capable of masking any printed pattern that might overlap onto the border from the central area. This eliminates the need for precise alignment and monitoring that is mandatory in the preprinted filament process.² Likewise, the dark central area on the reverse side of the article is capable of masking any potential bleed through of the design on the light colored central area of side one. This allows the printed image to be applied so as to result in a graphic that is more intensely colored than woven articles that are limited to a single front and rear color.³

Additionally, affixing a design on a jacquard article as set forth in Claims 21 and 29 gave the unexpected result of producing an image that was more crisp and sharp than other towels. The inventor attributes this surprising result to the increased density of the pile loops on a jacquard article as compared to other woven articles. Thus, viewing an image on a jacquard fabric is not unlike watching high definition television: the picture is more clear and sharp than the picture available on the alternative.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

(37 C.F.R. § 41.37(c)(1)(vi))

² U.S. Pat. App. No. 09/747,529 as filed, page 9, paragraph 4 through page 10, paragraph 1.

³ Id., at page 8, paragraph 2.

The Examiner has rejected Claims 21, 22, 24-30, and 32-36 under 35 U.S.C. §103(a) as being unpatentable over Stark (U.S. Pat. No. 3,669,818) in view of Parker et al. (1,925,459). Claims 21, 22, 24-30, and 32-36 further stand rejected under 35 U.S.C. §103(a) as being unpatentable over Parker et al. (1,925,459) in view of Stark (U.S. Pat. No. 3,669,818). Claims 21, 22, 24-30, and 32-36 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Stark (U.S. Pat. No. 3,669,818) in view of Parker et al. (1,925,459), and in further view of Sherrill et al. (U.S. Pat. No. 3,721,273). Finally, the Examiner has rejected the Appellant's declaration under 37 C.F.R. 1.132 as insufficient to overcome the rejection because the affidavit fails to provide hard evidence which established the claimed product fills a long felt need or resulted in commercial success.

ARGUMENT (37 C.F.R. § 41.37(c)(1)(vii))

Issue 1—The rejection of Claims 21, 22, 24 - 30, and 32 - 36 under 35 U.S.C. 103(a) as being unpatentable over Stark (U.S. Pat. No. 3,669,818) in view of Parker et al. (U.S. Pat. No. 1,925,459) and Sherrill et al. (U.S. Pat. No. 3,721,273). While this is the last rejection that the Examiner makes, it is the most comprehensive and is therefore dealt with first.

Issue 1a. CLAIM 21 (37 C.F.R. § 41.37(c)(1)(vii) subheading)

Stark discloses a printed textile fabric having a woven terry design consisting of areas of high, low, and no piles wherein a different printed pattern is superimposed on the textile, out of register with the woven pattern. Stark discloses that it is desirable to produce “new and aesthetically attractive products”⁴

Parker et al. teach a method of weaving a double faced terry article where terry loops can be on either or both sides of the woven article. Contrasting warp threads, i.e., those that would appear on the reverse side of the article, are allowed to “float.” After the

⁴ U.S. Pat. No. 3,669,818 Col. 1, lines 24-25; lines 50-57.

textile is complete, the floating warp threads are cut away. As pointed out by the Examiner, Parker discloses that it is known to use two contrasting colors to weave terry warp. A pattern mechanism could then produce terry loops of one color on the face of the textile, and simultaneously loops of the contrasting color on the back of the terry fabric. The warp threads can then be woven into the ground threads at the ends of the textile.⁵

Sherrill et al. discloses a terry towel having one face cotton terry, and the opposite face rayon terry. As can be seen in the Figures of Sherrill, the first side (Fig. 1) has printed thereon a central design, and an outer region having additional printed designs thereon. The second side (Fig. 2) is entirely of cotton terry without any designs.

The Examiner admits that neither Stark nor Parker teach “the specific features of a towel having borders at each edge and a central area where the printing is applied.” The Examiner instead states that “both Stark and Parker acknowledge that various woven and printed designs are known and can be combined together to form any desired visual appearance.”⁶ The Examiner cites Sherrill et al. as evidence that the “design claimed by the applicant, a border region surrounding a center area with a design or graphic, is known to those in the art.”⁷

Claim 21 is a product-by-process claim that is directed to a towel woven on a jacquard loom using at least two different colors of yarn. Stark does not disclose a specific loom, but discloses that “yarns of different colors may be employed to produce various parts or sections of the patterns....”⁸

Claim 21 calls for a border having a first color that is woven adjacent each edge on one side of the towel. Neither Stark, Parker, nor Sherrill has this feature. The Sherrill towel is woven such that the first side is entirely rayon terry, while the second side is entirely cotton terry. Therefore, the border of Sherrill as shown in Figure 1 is defined by

⁵ U.S. Pat. No. 1,925,459 Col. 2, lines 66-87.

⁶ U.S. Pat. App. No. 09/747,529 Non-Final Office Action dated 7/14/2005, page 4, paragraph 3.

⁷ *Id.*, at page 7, paragraph 4.

⁸ U.S. Pat. No. 3,669,818, Col. 1, lines 40-42.

a printed pattern (reference number 25). A printed border belies Claim 21, which requires a woven border for proper masking overlap onto the borders on one side, and potential bleed through to the on the other side.⁹

Claim 21 continues by stating that a border having a second color is adjacent each edge of the towel on its other side. Again, neither Stark, Parker, nor Sherrill has this feature. Sherrill et al. teach that the reverse side, as seen in Figure 2, is entirely of plain cotton terry. The Sherrill et al. towel is specifically manufactured so that the rayon terry piles are entirely on one side of the towel and the cotton terry piles are entirely on the other side.¹⁰ Sherrill et al. teach printing on the rayon fibers only, since they have an increased absorption for certain dyes, as is well known in the art. The printed pattern would therefore appear only on one side, the rayon side, of the towel. The reverse side of the towel, the cotton side, would not have the alternate color pattern as claimed and required by the Appellant.

Claim 21 continues by stating that the towel has a central area within the borders on both sides of the towel. While there is a central area in any two-dimensional product, this central area claimed in Claim 21 must be within the borders. The Sherrill et al. towel has a central area on only one side of the towel.

Claim 21 continues by stating that the central area on one side is in a first color, while the central area on the other side is in a second color. Neither Stark, Parker, nor Sherrill teach that the color on a towel is such that the central area on a first side and the borders on the second side are of one color, while the central area of the second side and the borders of the first side are of a second color. While the combination of Stark and Parker teach that different colors can be used on opposite sides of the towel, there is no teaching that the color on a towel is such that the central area on a first side and the borders on the second side are of one color, while the central area of the second side and

⁹ U.S. Pat. App. No. 09/747,529 Claim 21.

¹⁰ U.S. Pat. No. 3,721,273, col. 2, lines 52-59.

the borders of the first side are of a second color. This is how the jacquard loom is set up to make the towel of claim 21.

Claim 21 calls for forming a graphic impression in the central area on one of the sides. Neither Stark nor Parker forms a graphic impression in the central area of a woven product. While Stark does utilize a graphic impression, there is no defined central area for it to be formed within. Figure 1 of Sherrill et al. discloses this.

By utilizing the structure of claim 21, other objects of the invention can be achieved. This article is formed by jacquard weaving to create an article with a central light colored area, surrounded by a dark border. The reverse side of the article is a dark colored central area surrounded by a light colored border. A design can be printed in the light colored central area of the first side. The dark colored border surrounding the light central area is capable of masking any pattern that might overlap onto the border from the central area. This eliminates the need for precise alignment and monitoring that is mandatory in other printing processes.¹¹ Likewise, the dark central area on the reverse side of the article is capable of masking any potential bleed through of the design on the light colored central area of side one. This allows the image to be applied so as to result in a graphic that is more intensely colored than woven articles that are limited to a single front and rear color.¹² This structure is present in claim 21.

Finally, Claim 21 requires that “said border on said one side is capable of masking said graphic impression that may overlap onto said border from said ventral area on said one side, eliminating the need for precise alignment of said graphic impression within said central area of said one side” and that “said central are on said other side is capable of masking any potential bleed through of said graphic impression from said central area on said one side. Neither Parker, Stark, nor Sherrill disclose this feature.

Issue 1b. CLAIM 29 (37 C.F.R. § 41.37(c)(1)(vii) subheading)

¹¹ U.S. Pat. App. No. 09/747,529 as filed, page 9, paragraph 4 though page 10, paragraph 1.

¹² Id., at page 8, paragraph 2.

In considering Claim 29, it calls for a textile having edges adjacent its periphery. Each of Stark, Parker, and Sherrill has this feature.

Claim 29 continues by calling for a textile having first and second sides and, again, each of Stark, Parker, and Sherrill has this feature.

Claim 29 calls for each side having a border adjacent said edges and surrounding a central area. Neither Stark nor Parker has borders surrounding each edge of the towel and correspondingly, neither surround a central area. Sherrill et al. have an outer region having additional printed designs on only one side.

Claim 29 calls for the graphic impression to be positioned only within the central area on one side. Neither Stark nor Parker discloses this. Sherrill et al. discloses this in Figure 1.

The last two limitations of Claim 29 are with respect to the color of the border and the central area. Specifically, the border on the first side and the central area on the second side have a first color, while the central area on the first side and the border on the second side have a second color. Neither Stark, Parker, nor Sherrill teach these limitations.

By utilizing the color scheme in claim 29, other objects of the invention can be achieved. This article is formed by jacquard weaving which creates an article with a central light colored area, surrounded by a dark border. The reverse side of the article is a dark colored central area surrounded by a light colored border. A design can be printed in the light colored central area of the first side. The dark colored border surrounding the light central area is capable of masking any printed pattern that might overlap onto the border from the central area. This eliminates the need for precise alignment and monitoring that is mandatory in other printing processes.¹³ Likewise, the dark central

¹³ U.S. Pat. App. No. 09/747,529 as filed, page 9, paragraph 4 through page 10, paragraph 1.

area on the reverse side of the article is capable of masking any potential bleed through of the printed design on the light colored central area of side one. This allows the printed image to be applied so as to result in a graphic that is more intensely colored than woven articles that are limited to a single front and rear color.¹⁴ This scheme is present in Claim 29.

Finally, Claim 29 requires that “said border on said first side is capable of masking said graphic impression that may overlap onto said border from said central area on said [first] side, eliminating the need for precise alignment of said graphic impression within said central area of said first side” and that “said central area on said second side is capable of masking any potential bleed through of said graphic impression from said central area on said first side.” Neither Stark, Parker, nor Sherrill disclose this feature.

Issue 1. Conclusion (37 C.F.R. § 41.37(c)(1)(vii) subheading)

The Examiner states what is well known in patent law that matters relating to ornamentation only which have no mechanical function, cannot be relied upon to patentably distinguish the claimed invention from the prior art. The Examiner concludes that “the design pattern created by the two yarns in the woven towel controls the way the fabric looks and does not effect the structure of the towel or the way the towel is used. The towel is still made from multiple warp and weft yarns which are woven together to produce a standard terry cloth fabric, even if the yarns used to make the towel are all one color or all different colors. Hence, the pattern of the colored yarns only effects the ornamentation of the fabric and has no effect on the actual structure of the towel.”¹⁵ This conclusion demonstrates that the Examiner has not understood the structure that is behind the functional statements that appear at the conclusion of each of claim 21 and 29. As has been repeatedly stated, the dark colored border surrounding the light central area is capable of masking any printed pattern that might overlap onto the border from the

¹⁴ Id., at page 8, paragraph 2.

¹⁵ U.S. Pat. App. No. 09/747,529 Non-Final Office Action dated 7/14/2005, Page 5, paragraph 1.

central area.¹⁶ This eliminates the need for precise alignment and monitoring that is mandatory in the preprinted filament process. Likewise, the dark central area on the reverse side of the article is capable of masking any potential bleed through of the printed design on the light colored central area of side one.¹⁷

Due to the shortcomings of each reference, it would appear that the Examiner has disregarded the *Graham* inquiries¹⁸, and has instead relied on impermissible hindsight. The necessity of *Graham* findings is especially important where the invention is less technologically complex, as is the case here. In such a case, the danger increases that “the very ease with which the invention can be understood may prompt one ‘to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher.’”¹⁹

The towel of Claim 21 and the textile of Claim 29 are not technically complex. They are easy to understand. However, they are still undisclosed and unobvious over the prior art. As pointed out, the structure of the woven towel allow printed images to be applied more intensely than do other towels, while at the same time masking misalignment of the applied image within the central area.

Attached Table 1 sets forth the elements of both Claims 21 and 29 and views these with respect to the rejection of Stark, Parker, and Sherrill.

Issue 2—The rejection of Claims 21, 22, 24 - 30, and 32 - 36 under 35 U.S.C. 103(a) as being unpatentable over Stark (U.S. Pat. No. 3,669,818) in view of Parker et al. (U.S. Pat. No. 1,925,459).

Issue 2a. CLAIM 21 (37 C.F.R. § 41.37(c)(1)(vii) subheading)

¹⁶ U.S. Pat. App. No. 09/747,529 as filed, page 9, final paragraph.

¹⁷ *Id.*, at Page 8, paragraph 2.

¹⁸ *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966).

¹⁹ See *In re Dembiczak*, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999), abrogated on other grounds by *In re Gartside*, 203 F.3d 1305, 53 USPQ2d 1769 (Fed. Cir. 2000).

The limitations of Claim 21 and their relation to Stark and Parker have been discussed in the preceding *Issue 1*, and are equally applicable here. The Examiner admits that the combination of Stark nor Parker lacks nearly all of the limitations set forth in Claim 21, however the Examiner concludes that such features are of “no patentable weight” and merely “design choices.”²⁰

The Examiner’s dismissal of the functional language of Claim 21 as being of “no patentable weight” and “design choice” is improper. Claim 21 requires that the “said one side” is capable of masking graphic impression that may overlap onto the border from the central area on said one side and that the central area on “said second side” is capable of masking any potential bleed through of a graphic impression from the central area of the said one side. Appellant is not claiming all towels having the stated structure of, *inter alia*, the “said border on said one side” and the “central area of said one side.” Rather the claims are limited to the subset of towels that have the structure that will result in the claimed functions of (1) masking graphic impressions that may overlap onto the border from the central area on the “said one side” and (2) masking any potential bleed through of the graphic impression from the central area of the “said one side.” These two statements of function impose structure on the claimed towel, *i.e.*, the towel of Claim 21 must have the structure necessary to perform the two stated functions.

The court’s opinion in *In re Stencel*²¹ is instructive here as the court stated:

As a matter of claim draftsmanship, appellant is not barred from describing the driver in terms of the structure imposed upon it by the collar having plastically deformable lobes. The framework -- the teachings of the prior art -- against which patentability is measured is not all drivers broadly, but drivers suitable for use in combination with this collar, for the claims themselves are so limited.

²⁰ U.S. Pat. App. No. 09/747,529 Non-Final Office Action dated 7/14/2005, page 4, paragraph 3 though page 6, paragraph 1.

²¹ *In re Stencel*, 828 F.2d 751, 4 USPQ2d 1071 (Fed. Cir. 1987).

The court concluded that “Stencel is not inhibited from claiming his driver, limited by the statement of its purpose, and further defined by the remaining clauses of the claims at issue, when there is no suggestion in the prior art of a driver having the claimed structure and purpose.”²² In similar manner Appellant is claiming his inventive towel in part by stating the functional properties of two portions of the towel’s overall structure. It is entirely proper for Appellant to claim his towel in this manner and equally improper for the Examiner to dismiss these limitations as having “no patentable weight.”

The Examiner is also in error in dismissing the combination of towel structure and print color and pattern set forth in Claim 21 as a matter of design choice.²³ The issue of “design choice” was considered by the court in *In re Kuhle*.²⁴ In that case, the court held that a claim limitation was a matter of design choice because it solved “no stated problem.”²⁵ Contrary to the situation in *Kuhle*, the facts in this case establish that the claimed towel structure and print color and pattern do solve stated problems.

First, as set forth at page 8 of the present specification, constructing the towel with the borders and central areas having the claimed lighter and darker color scheme allows for the graphic impression printed on the central portion of the towel to overlap or be overprinted onto the border portions since any overlap/overprint will be masked by the borders.²⁶ Second, as stated at page 9 of the present specification, a towel having the claimed lighter and darker color scheme for the central portions and borders allows the graphic impression imprinted on the first side to have intense and varied colors as any bleed through will be masked by the darker central portion of the second side.²⁷ Thus, the problems of having to size the graphic impression to precisely fit within the border area or take measures to prevent the graphic impression from overlapping or being overprinted onto the borders of the towel are rectified. In addition, the towel of claim 21

²² *Stencel*, 828 F.2d 751 at 755, 4 USPQ2d at 1075.

²³ U.S. Pat. App. No. 09/747,529 Office Action of December 16, 2005, page 3.

²⁴ *In re Kuhle*, 526 F.2d 553; 188 USPQ 7 (CCPA 1975).

²⁵ *Kuhle*, 526 F.2d at 555, 188 USPQ at 9.

²⁶ U.S. Pat. App. No. 09/747,529 as filed, page 8, paragraph 2; Page 10, paragraph 2.

²⁷ *Id.*, at page 9, paragraph 2; and at page 8, paragraph 3 through page 9, paragraph 1.

solves the problems of having to design the graphic impression without using colors that would bleed through the towel.

When the limitations of Claim 21 are properly construed, it is seen that Stark '818, and Parker et al. '459 do not individually or together teach or suggest the subject matter of this claim. "It is well-established that before a conclusion of obviousness may be made based on a combination of references, there must have been a reason, suggestion, or motivation to lead an inventor to combine those references."²⁸ As stated in *In re Kotzab*,

A critical step in analyzing the patentability of claims pursuant to section 103(a) is casting the mind back to the time of invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and the then-accepted wisdom in the field. See [In re] *Dembiczak*, 175 F.3d 994 at 999, 50 U.S.P.Q.2D [1614] at 1617 [Fed. Cir. 1999]. Close adherence to this methodology is especially important in cases where the very ease with which the invention can be understood may prompt one "to fall victim to the insidious effect of a hindsight syndrome wherein that which only the invention taught is used against its teacher." *Id.* (quoting *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 U.S.P.Q. 303, 313 (Fed. Cir. 1983)).²⁹

Here, it is believed the Examiner has impermissibly used Appellant's claimed towel as a road map in order to combine the disparate features of Stark '818, and Parker et al. '459 in an attempt to arrive at the subject matter of Claim 21.

Issue 2b. CLAIM 29 (37 C.F.R. § 41.37(c)(1)(vii) subheading)

The limitations of Claim 29 and their relation to Stark and Parker have been discussed in the preceding *Issue 1*, and are equally applicable here. The Examiner admits that the combination of Stark nor Parker lacks nearly all of the limitations set forth in

²⁸ *Pro-Mold and Tool Co. v. Great Lakes Plastics Inc.*, 75 F.3d 1568, 1573, 227 USPQ2d 657, 662 (Fed. Cir. 1996).

²⁹ *In re Kotzab*, 217 F.3d 1365, 1369-70, 55 USPQ2d 1313, 1316 (Fed. Cir. 2000)

Claim 29, however the Examiner concludes that such features are of “no patentable weight” and merely “design choices.”³⁰

The Examiner’s dismissal of the functional language of Claim 29 as being of “no patentable weight” and “design choice” is improper. The comments presented therein with regard to Claim 21 as was argued at *Issue 2a* are equally applicable to Claim 29.

Issue 2. Conclusion (37 C.F.R. § 41.37(c)(1)(vii) subheading)

The Examiner states what is well known in patent law that matters relating to ornamentation only which have no mechanical function, cannot be relied upon to patentably distinguish the claimed invention from the prior art. The Examiner concludes that “the design pattern created by the two yarns in the woven towel controls the way the fabric looks and does not effect the structure of the towel or the way the towel is used. The towel is still made from multiple warp and weft yarns which are woven together to produce a standard terry cloth fabric, even if the yarns used to make the towel are all one color or all different colors. Hence, the pattern of the colored yarns only effects the ornamentation of the fabric and has no effect on the actual structure of the towel.”³¹ This conclusion demonstrates that the Examiner has not understood the structure that is behind the functional statements. As has been repeatedly stated, the dark colored border surrounding the light central area is capable of masking any printed pattern that might overlap onto the border from the central area.³² This eliminates the need for precise alignment and monitoring that is mandatory in the preprinted filament process. Likewise, the dark central area on the reverse side of the article is capable of masking any potential bleed through of the printed design on the light colored central area of side one.³³

³⁰ U.S. Pat. App. No. 09/747,529 Non-Final Office Action dated 7/14/2005, page 4, paragraph 3 though page 6, paragraph 1.

³¹ U.S. Pat. App. No. 09/747,529 Non-Final Office Action dated 7/14/2005, Page 5, paragraph 1.

³² U.S. Pat. App. No. 09/747,529 as filed, page 9, final paragraph.

³³ *Id.*, at Page 8, paragraph 2.

Due to the shortcomings of each reference, it would appear that the Examiner has disregarded the *Graham* inquiries, and has instead relied on impermissible hindsight. The necessity of *Graham* findings is especially important where the invention is less technologically complex, as is the case here. In such a case, the danger increases that “the very ease with which the invention can be understood may prompt one ‘to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher.’”³⁴

The towel of Claim 21 and the textile of claim 29 are not technically complex. They are easy to understand. However, they are still undisclosed and unobvious over the prior art. As pointed out, the structure of the woven towel allow printed images to be applied more intensely than do other towels, while at the same time masking misalignment of the applied image within the central area.

Attached Table 1 sets forth the elements of both claims 21 and 29 and views these with respect to the rejection of Stark, Parker, and Sherrill.

Issue 3—The rejection of Claims 21, 22, 24 - 30, and 32 - 36 under 35 U.S.C. 103(a) as being unpatentable over Parker et al. (U.S. Pat. No. 1,925,459) in view of Stark (U.S. Pat. No. 3,669,818).

Issue 3a. CLAIM 21 (37 C.F.R. § 41.37(c)(1)(vii) subheading)

The substance of the Examiner’s rejection on this ground is the same as the rejection argued in Issue 2a above. The Appellant’s comments there apply with equal force to this rejection.

³⁴ See *In re Dembiczak*, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999), abrogated on other grounds by *In re Gartside*, 203 F.3d 1305, 53 USPQ2d 1769 (Fed. Cir. 2000).

Issue 3b. CLAIM 29 (37 C.F.R. § 41.37(c)(1)(vii) subheading)

The substance of the Examiner's rejection on this ground is the same as the rejection argued in Issue 2b above. The Appellant's comments there apply with equal force to this rejection.

Issue 3. Conclusion (37 C.F.R. § 41.37(c)(1)(vii) subheading)

The substance of the Examiner's rejection on this ground is the same as the rejection argued in Issue 1a above. The Appellant's comments there apply with equal force to this rejection.

Issue 4—The Appellant's Rule 132 Declaration dated March 31, 2003, was submitted for establishing the commercial success of the "Edge® Towel" as indicia of nonobviousness. This declaration is attached hereto at Evidence Appendix 2, under 37 C.F.R. § 41.37(c)(1)(ix)

In the Board's decision of July 29, 2004, a decision was rendered solely on the basis that the Examiner's rejection did not establish a case of *prima facie* obviousness. The Board, therefore, did not comment on the applicability of the Appellant's submitted Declaration. If it is determined that Stark and Parker, with or without Sherrill, establish a *prima facie* case of obviousness, the evidence of commercial success must be considered.³⁵

The data and statements set forth in the Declaration supplied the Examiner with information concerning the sales of the Edge towel. From that it can be seen that in less than 3 years time, the Edge towel came to account for over 25% of Appellant's total revenue and over 20% of total pieces sold, while never accounting for more than 1% of Appellant's total products. Additionally in the Declaration, Appellant submitted two

³⁵ *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992).

letters that were written to industry competitors persuading them in light of this application to cease production of towels that were copied from Edge articles.

The Examiner states that the Affidavit under 37 C.F.R. 1.132 is insufficient to overcome the rejection because the Affidavit fails to provide hard evidence which established the claimed product fills a long felt need or resulted in commercial success.³⁶ The Examiner makes a number of statements in responding to the Amendment that bridge pages 2 and 3 of the Office Action. These statements will be addressed one at a time, as set forth hereinafter.

The Examiner's first statement is, "while the Applicant sets forth multiple statements related to the product's success and the Applicant's opinion why the product fills a long felt need, the Applicant fails to include any factual evidence which supports these statements." In response to this criticism, a Supplemental Affidavit supplying confidential sales and financial figures related to the Edge towel, as well as letters and various correspondence from competitors who clearly would like to, or have tried to knock off the present invention was submitted to the Examiner, and is now part of the record.

The Examiner states that Appellant needs to produce evidence such as market share or other factual evidence that would show how the towel has succeeded versus all competitors. The Examiner states that there is no evidence to show how successful the product has been in the market as compared to all competitors in the field.³⁷ First, the U.S. towel industry is small. There is no trade association that can legally provide sales figures in the relevant industry. The textile market itself does have a trade association, but it has no subgroup for towels.

Second, the Examiner should know that the textile market did poorly in 2001 and 2002, as compared to 2000 (for sometime, the U.S. textile market has been relocating

³⁶ U.S. Pat. App. No. 09/747,529 Final Office Action dated 1/23/2003, page 2, paragraph 3.

³⁷ U.S. Pat. App. No. 09/747,529 Final Office Action dated 1/23/2003, page 2, paragraph 4.

south of the border and to Asia due to cheaper production costs). Devant was no exception as its sales dropped 11.5%. On the other hand, the number of Edge products produced and sold increased greater than 5 times during this same period, and the same is true for its dollar sales figure. Assuming that all other competitors had down years, as Devant did, data submitted herewith clearly shows that sales of the Edge towel was growing.

The Examiner further states that Appellant bears the burden of proof of establishing a nexus between the claimed invention and evidence of commercial success and that the success is due to the claimed invention.³⁸ Other than the broad general statement, the Examiner has offered no specific and detailed comments that the Appellant has not already established the nexus between the claimed invention and the evidence of commercial success. The proof of this lies in the fact that the claims are narrow and specific to the Edge towel. The Edge towel covers each of the types of towels set forth in the Supplemental Affidavit of commercial success. The original Affidavit of success set forth the fact that it was created due to the inability and limitations of the jacquard process. Specifically, the original Affidavit says that by weaving a jacquard woven perimeter and having a graphic impression added to the towel overcomes the prior obstacles of being able to use a limited number of colors in a linear band in a woven graphic impression. This and other limitations in the claims are the nexus.

Lack of any specific deficiencies listed by the Examiner is indicative of the fact that the Examiner must believe that the claimed invention and the evidence of commercial success are satisfactorily entwined.

The Examiner states that *Appellant's statement that the claimed subject matter solved the problem that was long standing in the art, while on the other hand lacking a showing that others of ordinary skill in the art were working on the problem and if so, for how long*³⁹ is perhaps best answered by the Supplemental Affidavit previously submitted

³⁸ U.S. Pat. App. No. 09/747,529 Final Office Action dated 1/23/2003, page 2, paragraph 4.

³⁹ *Id.*, at page 2, paragraph 5, through page 3, paragraph 1.

to the Examiner. While the Supplemental Affidavit does not state that others were working on this problem or that they even recognize the problem, the fact that the Edge towel has had so much commercial success, and in particular the fact that its sales have increased more than 5 fold in the years 2000–2002 indicate that the marketplace recognize the superior product and that there was a long felt need for this. The lack of evidence relative to what others of ordinary skill in the art were doing is only one of many factors the Examiner should consider in evaluating commercial success. If many other factors are present, and this one factor is not present, this does not demonstrate that there is a lack of commercial success. Nowhere in the MPEP, nor in any case law, is there an explanation as to what factors are minimally required for proving commercial success. Instead, the courts recognize, and the MPEP supports such, by suggesting that there are many factors which one can consider when evaluating commercial success.

The Examiner says that there is no evidence that those skilled in the art knew of the teachings of the above-cited references and that they were still unable to solve the problem.⁴⁰ On the other hand, there is no reason to suggest that they did not know of the prior art. And yet, the present Inventor created the Edge towel. As set forth below relative to the rejections, it is submitted that even if those skilled in the art knew of the teachings of the cited reference they would still not arrive at the claimed invention because the cited references do not disclose all the elements of the claimed invention. “Knowing the cited references” would not help those skilled in the art relative to the present invention.

The Examiner states that evidence of infringement can be used to establish the long felt need was present in the marketplace. The Examiner states that Appellant has submitted no evidence detailing competitors trying to copy the invention.⁴¹ With the introduction of the Supplemental Affidavit, evidence is submitted to provide these details. As set forth in the Supplemental Affidavit, two of Devant’s biggest competitors have copied the Edge towel, but were persuaded to stop because of this patent

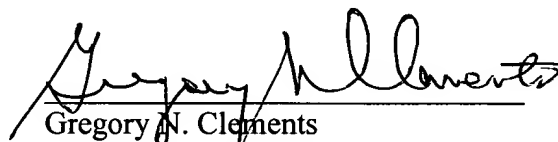
⁴⁰ U.S. Pat. App. No. 09/747,529 Final Office Action dated 1/23/2003, page 3, paragraph 1.

⁴¹ *Id.*

application. The first event was noted at the PGA (Professional Golf Association) show in early 2001 where Tommy Hilfiger voluntarily pulled its product on the first day of the show, after speaking with the Inventor about the Edge towel. The second event was the result of a conversation discussing Admanco's towel, and their voluntary agreement not to sell their knock-off towel.

Accordingly it is submitted that the Rule 132 Declarations provide convincing evidence of the unobviousness of the invention.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gregory N. Clements", written over a horizontal line.

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TABLE 1

Claim 21	Stark v. Parker v. Sherrill
Weaving a towel on a Dobby loom using at least 2 different colors. Application as filed (A.A.F.), page 6, paragraphs 2-3.	Stark does not disclose a specific weaving loom.
	Parker utilizes a Jacquard loom.
	Sherrill does not disclose a specific weaving loom.
Such that a border having a first darker color is woven adj. each edge on one side thereof. A.A.F., page 6, paragraph 3 – page 7, paragraph 1.	Neither Stark nor Parker has this. Sherrill has a border defined by printing.
And a border having a second lighter color is woven adj. each edge of said towel on the other side. A.A.F. page 7, paragraph 2.	Neither Stark nor Parker nor Sherrill has this.
Said towel having a central area woven within the borders on both sides. A.A.F. page 7, paragraph 2.	There is a central area but no borders. Sherrill has a central area on only one side.
Said central area on other side is woven with 1 st color. A.A.F. page 7, paragraph 2.	There is a central area but no borders.
Said central on said one side is woven in a 2 nd color. A.A.F. page 7, paragraph 2.	There is a central area but no borders. Sherrill's border is same color as central area.
Forming a graphic impression in said central area on said one side. A.A.F. page 8, paragraph 1.	Park discloses printing, but not within a central area. Sherrill discloses this.
Said border on said one side is capable of masking said graphic impression that may overlap onto said border from said central area on said one side. A.A.F. page 8, paragraph 1; page 9 paragraph 4 – page 10, paragraph 1; figure 3.	Neither Stark nor Parker nor Sherrill has this.
Said central area on said second side is capable of masking any potential bleed through of said graphic impression from said central area of said one side. A.A.F. page 8, paragraph 2 – page 9, paragraph 2.	Neither Stark nor Parker nor Sherrill has this.

TABLE 1 (continued)

Claim 29	Stark v. Parker v. Sherrill
A textile having edges about its periphery. A.A.F., page 6, paragraphs 2 - page 7, paragraph 1.	Each of Stark, Parker, and Sherrill has this feature.
Said textile having first and second sides. A.A.F. page 7, paragraph 2.	Each of Stark, Parker, and Sherrill has this feature.
Each side having a border adjacent said edges and surrounding a central area. A.A.F. page 7, paragraph 2.	Neither Stark nor Parker have borders or corresponding central areas
	Sherrill has an outer region with printed designs.
Said graphic impression to be positioned only within the central area on said first side. A.A.F. page 8, paragraph 1.	Neither Stark nor Parker discloses this.
	Sherrill et al. discloses this in Figure 1.
The border on the first side and the central area on the second side have a first color, while the central area on the first side and the border on the second side have a second color. A.A.F. page 7, paragraph 2.	Neither Stark, Parker, nor Sherrill discloses this.
Said border on said first side is capable of masking said graphic impression that may overlap onto said border from said central area on said [first] side, eliminating the need for precise alignment of said graphic impression within said central area of said first side. A.A.F. page 8, paragraph 1; page 9 paragraph 4 – page 10, paragraph 1; figure 3.	Neither Stark, Parker, nor Sherrill discloses this feature.
Said central area on said second side is capable of masking any potential bleed through of said graphic impression from said central area on said first side.” A.A.F. page 8, paragraph 2 – page 9, paragraph 2.	Neither Stark, Parker, nor Sherrill discloses this feature.

CLAIMS APPENDIX (37 C.F.R. § 41.37(c)(1)(viii)

The claims on appeal appear as follows:

21. A towel having a graphic impression, comprising: weaving a towel on a jacquard loom using at least two different colors of yarn, such that a border having a first darker color is woven adjacent each edge of said towel, on one side thereof, and a border having a second lighter color is woven adjacent each edge of said towel on the other side, said towel having a central area woven within said borders on both said one side and said other side, said central area is woven with said first darker color on said other side, said central area is woven with said second lighter color on said one side, and forming a graphic impression in said central area on said one side; wherein said border on said one side is capable of masking said graphic impression that may overlap onto said border from said central area on said one side, eliminating the need for precise alignment of said graphic impression within said central area of said one side; and wherein said central area on said other side is capable of masking any potential bleed through of said graphic impression from said central area of said one side.
22. The product of claim 21, wherein said forming is by screen printing, image dyeing, digital imaging, or heat transferring.
24. The product of claim 23, wherein said graphic impression has at least two different colors, neither being said first nor said second color.

25. (Previously Presented) The product of claim 23, wherein said border shape is selected from the class of rectangular shape, circular shape, oval shape, square shape, and irregular shape.
26. The product of claim 25, wherein said border is solid or a pattern.
27. The product of claim 26, wherein said pattern is selected from the class consisting of stripes, dots, names, silhouettes of sport players, animal shapes, corporate logos, or university mascots.
28. The product of claim 21, wherein said towel is sheared and bloomed.
29. A textile having a graphic impression; said textile having edges about its periphery; said textile having first and second sides; each side having a border adjacent said edges and surrounding a central area; said graphic impression being only positioned within said central area on said first side; said border on said first side and said central area on said second side having a first darker color; and said central area on said first side and said border on said second side having a second lighter color; wherein said border on said first side is capable of masking said graphic impression that may overlap onto said border from said central area on said one side, eliminating the need for precise alignment of said graphic impression within said central on said first side; and wherein said central area on

said second side is capable of masking any potential bleed through of said graphic impression from said central area of said first side.

30. The textile of claim 29, wherein said textile is a towel.
32. The textile of claim 30, wherein said border shape is selected from the class of rectangular shape, circular shape, oval shape, square shape, and irregular shape.
33. The textile of claim 30, wherein said border is solid or a pattern.
34. The textile of claim 33, wherein said pattern is selected from the class consisting of stripes, dots, names, silhouettes of sport players, animal shapes, corporate logos, or university mascots.
35. The textile of claim 29, wherein said textile is sheared and bloomed.
36. The textile of claim 30, wherein said towels are selected from the class of a bath towel, beach towel, kitchen towel, or a sport towel.

EVIDENCE APPENDIX (37 C.F.R. § 41.37(c)(1)(ix))

1. Attached hereto are copies of the Appellant's Rule 132 Declaration dated November 14, 2002 and Supplemental Declaration dated March 31, 2003, that were submitted for establishing the commercial success of the "Edge® Towel" as indicia of nonobviousness.

RELATED PROCEEDINGS APPENDIX (37 C.F.R. § 41.37(c)(1)(x))

1. Attached hereto is a copy of the Board of Patent Appeals and Interferences' decision dated July 29, 2004, reversing the Examiner's previous rejection of the current claim set and affirming the Appellant's position regarding the Examiner's rejection.